

AMERICAN ARBITRATION ASSOCIATION

-----X
In the Matter of the Arbitration

between

CITY OF PHILADELPHIA,

“City”

- and -

F.O.P. LODGE NO. 5,

“Union”
-----X

AAA Case No.

14 390 00574 12

Opinion & Award

Re: Suspension of
Aletta Horne Powell

Hearings: April 8, 2013
June 26, 2013

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Colin Haviland, Esq., Assistant City Solicitor

For the Union

JENNINGS SIGMOND, P.C.
Marc L. Gelman, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The Department suspended Police Officer Aletta Horne Powell for five days beginning February 22, 2011. It took this action based on one charge of “Insubordination - Unspecified.” alleging Powell violated Section 4-§-001-10 of the Department’s Disciplinary Code by failing to comply with an order from a superior officer. (Joint Exhibit 3.)¹ The Union contends the Department lacked just cause to impose this suspension. It asks that the suspension be reversed and Powell be made whole for all pay and benefits lost as a consequence of it. It also requests that all reference to the suspension be expunged from her personnel record.

The basic facts of this case are largely undisputed. They may be set forth succinctly.

Powell has been a member of the Department for approximately twenty-seven years. At the time of the events leading to the suspension at issue, she had no record of discipline.

From 1999 – 2010, Powell was assigned to the Department’s EEO Unit. The Unit’s principal functions consisted of investigating EEO complaints filed by Department members and conducting EEO training. The training served to inform Department members as to the applicable anti-discrimination laws, relevant Department policies and the process for the filing and investigation of complaints.

¹ The Union represents that it has not accepted the current Disciplinary Code, but maintains instead that the Department implemented it unilaterally in 2010. It notes that the implementation of the Code is the subject of an unfair labor practice charge pending before the Pennsylvania Labor Relations Board. In addition, it points out that the Act 111 Board of Arbitration has ruled that notwithstanding the terms of the Code, disciplinary arbitrators are empowered to determine the appropriateness of the penalty imposed by the City in any instance in which just cause to discipline is found.

In January 2010, Captain C [REDACTED] A [REDACTED] took command of the Unit. She testified that upon review, she concluded that the Unit should become more proactive in its approach, which included increasing the number of trainings it conducted. In order to do so, she determined that all five members of the Unit needed to be trained and qualified to conduct the training. At that time, only Police Officers L [REDACTED] R [REDACTED] and E [REDACTED] O [REDACTED] were qualified to do so. Powell regularly accompanied both R [REDACTED] and O [REDACTED] to training sessions, but functioned solely in an assistive capacity. A [REDACTED] also noted that having all Unit members qualified to conduct the training would provide backup and thereby eliminate the need to cancel training sessions due to the sudden unavailability of R [REDACTED] and Powell on a scheduled training day.

A [REDACTED] recounted that in implementing her plan, she had the City's EEO unit prepare a PowerPoint presentation containing the training material. This document was provided to each Unit member, including Powell, together with a DVD for use in conducting the training.

On July 20, 2010, A [REDACTED] issued a written order concerning the EEO training to be conducted for School Police on August 9, 2010.² This order, which was addressed to Unit members Sergeant K [REDACTED] M [REDACTED]³ and Police Officers Powell and O [REDACTED] instructed that Powell would be the lead trainer and O [REDACTED] would assist. (City Exhibit 1.)

M [REDACTED] testified that he delivered this order to both Powell and O [REDACTED]. M [REDACTED] recalled that later the same day, Powell advised him that in her opinion, she had not received adequate training to function as the lead trainer. In response, he agreed

² When A [REDACTED] issued her order, this training was scheduled for August 12, 2010. Some time thereafter, the date of the training was changed to August 9, 2010.

³ M [REDACTED] has since been promoted to the rank of Lieutenant.

to discuss her concern with A [REDACTED]. When he subsequently did so, A [REDACTED] stated that her order stands. He, in turn, related this decision to Powell, stating, "The Captain's order stands."

In her testimony, Powell concurred with M [REDACTED]'s account of their initial conversation concerning A [REDACTED]'s July 20, 2010 order. She averred, however, that in their second conversation, M [REDACTED] stated, "Don't worry. L [REDACTED] [O [REDACTED]] is going to take the lead." According to Powell, she understood his statement to mean that A [REDACTED] had modified the order to allow her and O [REDACTED] to switch roles for this training. She, in turn, related this information to O [REDACTED].

On August 9, 2010, both A [REDACTED] and M [REDACTED] attended the training to observe. A [REDACTED] related that upon seeing O [REDACTED] standing at the lectern in the front of the room and Powell seated in a chair nearby, she called O [REDACTED] aside and questioned why she appeared to be taking the lead for this training. According to A [REDACTED], O [REDACTED] responded that Powell had informed her that the order had been revised to switch their roles for the training.

A [REDACTED] advised O [REDACTED] that her order had not been changed. She stated, however, that she did not take any immediate action as to this situation because she did not want to cause a scene at the training.

Upon subsequently confirming that Powell had not in fact served as the lead trainer at this training, but only assisted O [REDACTED], A [REDACTED] concluded that Powell should be disciplined for disregarding her order.⁴ (City Exhibits 2 & 3.) Consequently, she

⁴ A [REDACTED] reported that C [REDACTED] received a verbal reprimand as a consequence of her conduct in this matter.

charged Powell with violating Section 4-§001-10 (i.e., Insubordination – Unspecified). (Joint Exhibit 2)⁵

Following a November 5, 2010 hearing, a Police Board of Inquiry (“PBI”) found Powell guilty of this charge. Consistent with the PBI’s recommendation, the Department suspended her for five days beginning March 14, 2009. (Joint Exhibit 2.)

This action prompted the instant grievance. (Joint Exhibit 2.)⁶ When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. Pursuant to their contractual procedures, the parties selected me to hear and decide the case. (Joint Exhibit 1.)

I held a hearing on April 8, 2013, at the offices of the American Arbitration Association in Philadelphia, which continued on June 26, 2013.⁷ At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the June 26th hearing, I declared the hearing record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

⁵ A [REDACTED] explained that in deciding to take this action, she took into consideration prior instances in which Powell had not followed her orders. She cited two examples. In the first, Powell disregarded her instruction not use court notices when scheduling interviews with superior officers. Powell claimed that the prior Captain had allowed her to do so. The second involved Powell’s failure to use a 30-day notice as instructed in scheduling an interview, which resulted in the interview being set for a date later than A [REDACTED] desired.

⁶ The discipline imposed also included a transfer of Powell from the EEO Unit to the 5th District. The Union, however, does not seek to challenge the transfer as the issue was mooted by the Department’s subsequent disbanding of the Unit.

⁷ By agreement of the parties, the June 26, 2013 hearing was conducted telephonically.

1. Did the City have just cause to suspend the grievant, Police Officer Aletta Horne Powell for five days, effective February 22, 2011?
2. If not, what shall be the remedy?

Positions of the Parties

The City contends that its suspension of Powell was for just cause. It maintains that the evidence conclusively demonstrates Powell's guilt on the charge of insubordination.

The City, citing the testimony of A [REDACTED] and M [REDACTED], argues there can be no doubt that A [REDACTED] properly ordered Powell to lead the August 9, 2010 EEO training session, and Powell disregarded that order. It highlights further that Powell exacerbated her transgression by misrepresenting to O [REDACTED] that the order had been changed, causing her to be drawn into Powell's wrongdoing.

On the issue of penalty, the City submits that the level of discipline imposed here was entirely appropriate. It notes that a five-day suspension is well within the applicable range of discipline for a first offense under Section 4-§001-10 of the Department's Disciplinary Code (i.e., reprimand to dismissal), and more than justified in view of the surrounding circumstances of this case.

Accordingly, for all these reasons, it asks that the suspension be sustained and the grievance be denied.

The Union, on the other hand, maintains that the City lacked just cause to suspend Powell for insubordination. The Union submits that the City has failed to meet its burden of proof in this regard.

The Union explains that this is a straightforward case that turns entirely on the issue of credibility. It does not dispute that A [REDACTED] gave Powell an order to serve as the lead trainer at the August 9, 2010 training. It argues, however, that Powell cannot be found to have violated that order because M [REDACTED] subsequently advised her that it had been modified. As she credibly testified, M [REDACTED], after purportedly conferring with A [REDACTED] informed her that C [REDACTED] would serve as the lead trainer. Therefore, it concludes, Powell by assisting with the training acted consistent with the modified order, and, by definition, was not insubordinate.

In sum, it submits that the grievance should be granted and the requested relief awarded.

Opinion

There can be no dispute that the Department has a right to expect that its officers will comply with proper orders issued by their superior officers. Indeed, the orderly operation of the Department and the effective fulfillment of its mission demand no less. Officers who violate this duty can and should expect discipline will follow.

The City, of course, carries the burden of proof here. It must demonstrate by a preponderance of the credible evidence that Powell committed the charged offense. It must also establish that the level of discipline imposed is appropriate. The Union, on the other hand, has no corresponding burden. It need not disprove the charges against Powell. Indeed, she is entitled to the presumption of innocence.

On review, the record convinces me that the City has met its burden. My reasons for this conclusion follow.

It stands undisputed that A [REDACTED] ordered Powell to serve as the lead trainer at the August 9, 2010 training. Likewise, there is no question that Powell did not perform that role at this training. The only factual issue to be resolved is whether M [REDACTED] informed Powell, as she claims, that the order had been modified to allow her to switch roles with O [REDACTED]. I am persuaded that M [REDACTED] did not issue any such revision or modification of A [REDACTED]'s order.

I found M [REDACTED]'s testimony as to his conversations with Powell concerning A [REDACTED]'s order to be clear, consistent and convincing. It withstood rigorous cross-examination well. He very precisely described both agreeing to raise Powell's concerns with A [REDACTED] and subsequently notifying Powell that A [REDACTED] refused to modify the order. In sum, his account had the ring of truth.

In contrast, the same cannot be said for Powell's corresponding testimony. While not flawed by obvious inconsistencies or equivocation, her account nonetheless lacks credibility as it defies common sense. It is simply not plausible that M [REDACTED], after conferring with A [REDACTED] and being told emphatically that her order stands, would place himself in jeopardy by countermanding that order. Not surprisingly, no motive was even suggested for A [REDACTED] to act so counter to his own self-interest.

Powell's version would make sense only if M [REDACTED] had responded to her expressed concerns by unilaterally modifying A [REDACTED]'s order, and then subsequently failing to confirm the change with A [REDACTED]. In that event, M [REDACTED] would have had a reason to deny giving such an instruction when A [REDACTED] discovered her order was not being followed. However, the record confirms that was not the situation here. By her own account, Powell acknowledged that M [REDACTED] did not agree to modify A [REDACTED]'s

order when she initially approached him with her concerns as to serving as lead trainer. Instead, he stated that he would need to speak with A [REDACTED]. Indeed, it stands undisputed that he did in fact confer with A [REDACTED], and she advised that her order would not be changed.

Finally, although alluded to by Powell, proof of a damning admission by M [REDACTED] to O [REDACTED] never materialized. Quite the opposite, O [REDACTED]'s testimony buttressed M [REDACTED]'s account. Specifically, she recalled that when M [REDACTED] subsequently interviewed her regarding this matter, he mentioned that in response to the order, Powell had expressed reservations with serving as the lead trainer, and he, in turn, responded that her concerns would have to be raised with A [REDACTED].

Having found that M [REDACTED] never informed Powell that A [REDACTED]'s order was modified, it necessarily follows that she was guilty of insubordination by failing to serve as the lead trainer at the August 9, 2010 training. Thus, there remains only the question whether the suspension she received is an appropriate measure of discipline here. I conclude that it is. While I am mindful of Powell's long-tenure and lack of prior discipline, it does not provide a basis for me to find that a five-day suspension was excessive. Powell's insubordination was a serious offense that warranted strong discipline. Further, her misconduct went beyond simply disregarding A [REDACTED]'s order. It also included misrepresenting to O [REDACTED] that the order had been changed, thereby involving her in violating the order.

Accordingly, for all these reasons, the Union's grievance is denied.

AWARD

1. The City had just cause to suspend Aletta Horne Powell for five days beginning February 22, 2011.
2. The grievance is denied.

July 22, 2013



David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

July 22, 2013



David J. Reilly, Esq.
Arbitrator